In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-592

LARIMER COUNTY DEPARTMENT OF SOCIAL SERVICES, THE BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, THE COLORADO STATE DEPARTMENT OF SOCIAL SERVICES, ARMANDO RATENCIO, MARTIN C. COKER, DOUGLAS KEASLING, LARRY R. LONG, BENJAMIN F. NAPHEYS III, DAVID WEITZEL, NONA THAYER, and WILLIAM LOPEZ,

Petitioners,

vs.

THE HONORABLE JOHN L. KANE, JR., United States District Judge for the District of Colorado, and DAVID BRYAN PIRENTE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The above-named Petitioners, by their attorneys, ELLIOTT & GREENGARD, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on September 18, 1979.

OPINIONS BELOW

The District Court's ruling with regard to the discovery matters now before the Court was issued from the bench during proceedings held on August 24, 1979. The District Court's ruling is further set forth in a Protective Order issued on September 13, 1979. The United States Court of Appeals for the Tenth Circuit rendered no opinion on the Petitioners' Petition for Writ of Mandamus and instead issued a summary denial on September 18, 1979 (Sept. Term, No. 79-2005).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on September 18, 1979, and copies thereof are appended to this Petition in the Appendix at page 10. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In a civil action commenced pursuant to 42 U.S.C. Sections 1983, 1985(3), and 1988, Respondent Pirente sought discovery, under Rules 30, 33, and 34 of the Federal Rules of Civil Procedure, of information and documents contained in the personnel files of the Respondents' co-workers at the Larimer County Department of Social Services. The Petitioners interposed an objection of privacy and confidentiality in the District Court on the ground that disclosure of the requested information would seriously hamper the effectiveness of the employee evaluation system of the Larimer County Department of Social Services and would cause a serious breach of the privacy rights of both the supervisors who rendered the evaluations contained in the personnel files and the employees who are the subjects of those files. The District Court nevertheless ordered the requested documents disclosed subject only to the limited restrictions contained in the Protective Order issued on September 13, 1979. The Petitioners sought relief by way of a Petition for Writ of

Mandamus to the Tenth Circuit Court of Appeals. However, the Court of Appeals denied that Petition without briefing or argument on September 18, 1979. The questions presented are:

1. Did the District Court usurp its power by ordering the discovery of the privileged and confidential documents relating to employee personnel files and thereby make relief by way of Writ of Mandamus and Prohibition appropriate in this case?

2. Can a government employee seeking redress from termination by means of a lawsuit styled as a deprivation of civil rights be perfunctorily permitted to engage in broad discovery encompassing all personnel information relating to other employees of the governmental agency from which he was terminated?

3. Even if such a plaintiff is permitted to gain disclosure of some of the information relating to government agency personnel, can such disclosure be ordered by the Court without an accompanying Protective Order tailored to protect the privacy interests of the agency supervisors and employees?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The pertinent provisions of Amendments Five and Fourteen of the United States Constitution, 42 U.S.C. Sections 1983, 1985(3) and 1988, and Rules 26(b)(1), 30, 33, and 34 of the Federal Rules of Civil Procedure are relevant to the discovery issue in this case.

STATEMENT OF CASE

The Respondent Pirente commenced this Civil Action No. 79 K 109 in the United States District Court, District of Colorado for his alleged wrongful termination by the Petitioners. His Complaint included the allegation that the Defen-

dants fired him in retaliation for his exercise of First Amendment rights. The Respondent Pirente, through requests for documents, interrogatories and oral depositions, sought to obtain the personnel files and other privileged information concerning employees of the Department of Social Services not parties to this litigation. The Petitioners, who include the Chief Executive Officers of Larimer County and the Directors of the Department of Social Services, have refused to provide the information requested on the grounds that it is confidential, privileged, and not calculated to lead to the discovery of relevant information. The Petitioners have offered to provide the requested information on either an identity-deleted basis or, in its entirety, if the employees who are the subject of the said personnel files give knowledgeable consent to disclosure.

The Respondent-Plaintiff filed a "Motion for Determination with Respect to Discovery" seeking an Order from the District Court requiring the Petitioners to disclose the requested information and documents. On August 24, 1979, Respondent District Court Judge John L. Kane, Jr. made a ruling from the bench that the Petitioners were required to disclose the requested information. The District Court issued a Protective Order on September 13, 1979 which limits the Respondent Plaintiffs access to and use of the personnel information only in that "the same shall not be used by Plaintiff's counsel or representatives for any purpose not directly related to this lawsuit."

The Respondent-Plaintiff demanded immediate compliance with the Court's Order respecting discovery. Once the confidentiality of this information is breached, irreparable harm is done to both the effectiveness of the employee evaluation system and the privacy rights of the employees. Hence, rather than waiting for a final judgment and perfecting an appeal, the Petitioners sought immediate relief by way of Writ of Mandamus from the Court of Appeals for the Tenth Circuit. On September 18, 1979, the Petition for Writ of Mandamus was denied by the Tenth Circuit. Realizing the same need to protect the confidentiality of this information from its imminent breach, the Petitioners now seek relief

from this Court by way of Petition for Writ of Certiorari to review the Court of Appeals' decision to deny the Petitioners' Request for Writ of Mandamus.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously permits the District Court to usurp its power by permitting the Respondent-Plaintiff to gain access to privileged and confidential documents and information without any limitation in scope or a protective order designed to protect the confidentiality interests of the Department of Social Services or the privacy interests of the employees of that agency. This decision if unreversed, poses a threat to the privacy rights of all government employees. The decision below is in conflict with the decision of this Court in *Detroit Edison Co. v. NLRB*, ____ U.S. ____, 99 S.Ct. 1123 (1979, and, it poses questions of first impression left undecided by that case. In any event, this Court should grant review.

1. It has been the policy of the Department of Social Services to maintain the confidential and privileged status of the information sought by Respondent Plaintiff. The objection on the basis of privilege has been interposed by the highest ranking officials in the Larimer County government as required by *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394 (1976). The Petitioners have also made efforts to compromise with the Respondent-Plaintiff by fashioning a means for providing the requested information without damaging the effectiveness of the evaluation system or breaching the privacy interests of the Social Services Department employees. Petitioners have offered to provide the requested personnel information on a name-deleted basis or, in its entirety, if the employees in question waive their privilege. Thus, the Petitioners' efforts have not been limited to blanket assertion of privilege, but rather have included good faith efforts to claim only the privilege that is essential to protect the privacy interests outlined herein.

2. In order to be an effective means of employee evaluation, the system utilized by the Petitioners requires open and candid comment by the supervisors making the evaluations. Disclosure of these confidential evaluations will chill future candidness on the part of the evaluating supervisors and will substantially hamper the ability of the Department to receive adequate and honest evaluations of its employees. This lawsuit does not pose the situation of a class action wherein personnel documentation is necessary to show a historical pattern of discrimination or unconstitutional conduct by supervisory personnel, but rather is an action by a single employee seeking redress from his own isolated incident of termination. Nor is this a case where the Defendant executives have attempted to set up their personnel records as a means of defense. *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977). Thus in this case, it is clear that any tangential relevance of co-employees' personnel files to the Respondent-Plaintiff's claim is clearly outweighed by the need to maintain the files' confidentiality.

3. The importance of the privacy interests of the Respondent Plaintiffs' fellow employees in the Department of Social Services is of the highest order. This Court has recognized the importance of those privacy interests in the analogous case of *Detroit Edison Co. v. NLRB, supra.* As Mr. Justice Stewart stated at 99 S.Ct. 1133:

> The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice.

The privacy rights of individual citizens have been recognized to be of sufficient magnitude to warrant the protection of the United States Constitution. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The employees have a genuine interest in seeing that the intimate biographical details contained in their personnel files not be laid bare to the world. *Lora v. Board of Education of the City of New York*, 74 FRD 565 (E.D. N.Y. 1977).

This Court should consider the privacy rights of the agency employees in this case even though those employees are not actually parties to the litigation. The Department of Social Services, absent a showing of bad faith, is a proper party to assert the rights of its members. *Sierra Club v. Morton*, 405 U.S. 727 (1972). Similarly, the Department of Social Services and its Directors are engaged in an ongoing relationship with the department employees who will be adversely affected by disclosure of the requested information. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Furthermore, it would be difficult and unduly burdensome to those employees to intervene in this litigation to protect their own privacy interests.

4. The Petitioners do not seek to assert a blanket privilege with regard to the documents and information requested, but rather to balance the confidentiality of that information with the Respondent Plaintiff's need for the information without unduly compromising the effectiveness of the evaluation system and the privacy rights of the department employees. The Protective Order issued by the Respondent-District Court in this case will not adequately protect either of those interests and thus the District Court abused its discretion by not issuing an Order which is aimed at balancing the privileged status of this information and the Respondent-Plaintiff's need for the information in this litigation. See, *Usery v. Ritter*, 547 F.2d 528 (10th Cir. 1977); *Lora v. Board of Education of the City of New York, supra.*

5. The questions presented by this case are of great and recurring significance to the administration of government employee termination cases brought pursuant to the Civil Rights Act. Failure to grant review at this stage of the litigation will force the Petitioners to either breach the confidentiality, which will then permanently negate any utility in asserting it in the future, or expose themselves to the District Court's sanctions for failure to make discovery. The serious questions of public policy involved herein and the effect of the decision below, if unreversed, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

ELLIOTT & GREENGARD

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By Robert E. Crane
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit has been mailed this 8th day of October, 1979 to:

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Honorable John L. Kane, Jr.
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District of Colorado
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Denver, Colorado 80294

Solicitor General
Department of Justice
Washington, D.C. 20530

Richard D. Greengard

APPENDIX

SEPTEMBER TERM – September 18, 1979

Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein and Honorable William E. Doyle, Circuit Judges

LARIMER COUNTY DEPARTMENT OF SOCIAL SERVICES, THE BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, THE COLORADO STATE DEPARTMENT OF SOCIAL SERVICES, ARMANDO RATENCIO, MARTIN C. COKER, DOUGLAS KEASLING, LARRY R. LONG, BENJAMIN F. NAPHEYS III, DAVID WEITZEL, NONA THAYER, and WILLIAM LOPEZ,	)	
Petitioners,	)	
v.	)	No. 79-2005
THE HONORABLE JOHN L. KANE, JR., United States District Judge for the District of Colorado, and DAVID BRYAN PIRENTE,	)	
Respondents.	)	

This matter comes on for consideration of a petition for writ of mandamus.

Upon consideration whereof, it is ordered that the petition for writ of mandamus is denied.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The above-named Respondents, by and through their attorneys, Feiger and Lawson, pray that the Petition for Writ of Certiorari filed by the above-named Petitioners requesting review of the Judgement of the United States Court of Appeals for the Tenth Circuit entered on September 18, 1979, be denied.

OPINIONS BELOW

As a point of clarification, the Respondents would note that the District Court ruling in this matter issued from the bench only after full and exhaustive legal argument on the issues.

QUESTIONS PRESENTED

The information sought by Respondent Pirente pursuant to Rules 30, 33 and 34 of the Federal Rules of Civil Procedure which became the subject of the District Court ruling of August 24, 1979, is incorrectly described by the Petitioners in the Petition. Respondent Pirente requested that the District Court order discovery of information concerning only those employees who had been terminated by the Petitioners and employees who had received unsatisfactory performance ratings.

The District Court ordered the Petitioners to comply with the discovery request subject to a protective order which precludes Respondent Pirente and his attorneys from using the information for any purpose not directly related to this lawsuit.

The Respondents disagree with the questions presented in the Petition and suggest the following as the issues appropriately before the court:

1. Did the District Court usurp its power by ordering the discovery of documents, allegedly privileged, relating to employee personnel files and thereby make relief by way of Writ of Mandamus and Prohibition appropriate in this case?

2. Is a government employee who files a lawsuit alleging that he has been deprived of his civil rights through the actions of his employer in terminating him entitled to discovery of personnel information concerning other employees who have been terminated or have received "unsatisfactory" performance evaluations?

3. If the District Court permits such discovery conditioned on compliance with a Protective Order which limits the use of the information so obtained to purposes directly related to the lawsuit, is it appropriate for the U.S. Supreme Court to examine the sufficiency of the Protective Order?

STATEMENT OF CASE

The Respondents agree with the Statement of Case in the Petition except for the description of the discovery sought and the contention that irreparable harm will result from the disclosure of the information sought.

The discovery which was the subject of the District Court's order concerned only the personnel documents of those employees who have been terminated by the Petitioners-Defendants or who have received unsatisfactory performance ratings. The characterization of this information as privileged and confidential is questionable, and, in any event, the District Court's Protective Order would safeguard the interests of the employees by strictly limiting the use of the information.

ARGUMENT

The Petitioners contend that review of the decision below is justified because the decision 1) erroneously permits the District Court to usurp its power, and 2) conflicts with the decision of the United States Supreme Court in Detroit Edison Co. v. N.L.R.B. _____ U.S. _____, 99 S.Ct. 1123 (1979) and poses questions of first impression which should be addressed in review.

These reasons are insufficient to justify review by this court and are based on a misleading interpretation of the District Court's Order as well as of the relevant case law.

I. The District Court did not usurp its power by compelling discovery.

The Petitioners have repeatedly characterized the scope of the discovery ordered in this case as "without any limitation". In fact, the District Court ruling concerned only information from the personnel files of employees who have been terminated and who have received unsatisfactory evaluations; as such, the ruling would affect fewer than ten people, according to information provided by the Petitioners.

Further, the court conditioned disclosure of the information upon the drafting of the parties and approval by the Court of a Protective Order which would strictly limit the use of the information discovered. Although counsel for the Respondent Pirente sought to negotiate an acceptable proposed Protective Order with counsel for the Petitioners, counsel for Petitoners responded only by declining to sign the proposed order, which was then forwarded to the District Court for approval. The Protective Order as issued by the District Court provided that the documents could be seen only by Respondent Pirente's attorneys and their representatives and used only for purposes directly related to this lawsuit.

Prior to the District Court's ruling, the Petitioners refused to provide the discovery on the grounds of privilege and irrelevance. No authority has ever been cited to support the claim of privilege, but if the right to privacy as recognized in Detroit Edison Co. v. N.L.R.B., supra, and Griswold v. Connecticut, 381 U.S. 479 (1965) is seen as applicable in this case, it must also be recognized that that right is not absolute and must be balanced with Respondent Pirente's need for the information sought.

Although the Petitioners have offered to provide the information on an identity-deleted basis, Respondent Pirente could not agree to this because the documents would then be useless for purposes of comparison, since it would be impossible to correlate information from varying sources relating to specific employees. The Petitioners have also offered to release the information for any employee who agrees to such release; however, at least one employee expressed concern that she would be viewed as supporting Plaintiff-Respondent Pirente in his lawsuit if she agreed to the release.

The vague allegations made by the Petitioners that disclosure of the information sought will cause irreparable damage to the evaluation system of the Department of Social Services and to the privacy interests of other employees have never been supported by any specific evidence. The Petitioners did not offer, during argument on Plaintiff-Respondent Pirente's Motion for Determination With Respect to Discovery, any evidence that the employees involved actually fear invasion of privacy.

The need for the information sought and its relevancy to the issues presented in Respondent Pirente's lawsuit is very clear, however. In order to show that he has been subjected to disparate treatment, Respondent Pirente must compare his treatment with that of other employees. The burden of proof is heavy in civil rights cases, and, therefore, full discovery is absolutely essential. Gaison v. Scott, 59 F.R.D. 347, 352 (D.C. D. Hawaii 1973); Lora v. Board of Education of the City of New York et al, 74 F.R.D. 565, 579 (D.C. E.D.N.Y. 1977).

In this case, the Protective Order issued by the District Court sufficiently safeguards the confidentiality and privacy rights of both the Department of Social Services and the employees, thereby correctly balancing these interests with the right of Respondent Pirente to full discovery. The District Court, being familiar with the parties and circumstances involved, was in the best position to determine the sufficiency of the Protective Order which, by its own direction conditioned the release of the information.

The Tenth Circuit Court of Appeals, by denying the Petition for Writ of Mandamus, recognized that the District Court had neither usurped its power by compelling discovery not abused its discretion by approving the Protective Order as written.

II. The decision below is not in conflict with the other decisions of the United States Supreme Court, nor does it pose questions of first impression subject to review by the Court.

The facts of this case are easily distinguished from those in Detroit Edison Co. v. N.L.R.B., supra and, therefore, the decision below does not conflict with that decision. In Detroit Edison the Court reviewed an N.L.R.B. order that a union be allowed discovery of psychological tests used by the Detroit Edison Company and scores achieved by employees. Although the N.L.R.B. ordered the union not to take any action which might cause the tests to fall into the hands of employees who had taken or were likely to take them, the Court was not satisfied with this safeguard and vacated the N.L.R.B. decision. One of the primary concerns of the Court seemed to be that the union would not be subject to a contempt citation if it ignored the restrictions, because the union was not a party to the enforcement proceeding in the appellate court.

Obviously, the security and privacy interests involved in Detroit Edison were quite different from those of the instant case, as was the risk of violation of the restrictions. Unlike the union, Respondent Pirente and his attorneys would be subject to a contempt citation if the provisions of the District Court's Protective Order were violated.

Although the Petitioners state that the instant case also poses questions of first impression which would justify review of the decision below, they fail to articulate these questions thereby making it impossible for the Respondents to challenge them, or the court to consider them. The courts have considered the discovery involved in this case on many occasions since the passage of the Civil Rights Act of 1964 especially, and have resolved the conflict with protective orders. Carr v. Monroe Manufacturing Company, 431 F 2d 384 (5th Cir. 1970); Gaison v. Scott, 59 F.R.D. 347, 352 (D.C. D. Hawaii 1973); Lora v. Board of Education of the City of New York, et al., 74 F.R.D. 565, 579 (D.C. E.D. N.Y. 1977). The District Court in this case similarly balanced the interests and attempted to resolve the conflict.

III. The Tenth Circuit Court of Appeals acted within its discretion in denying the Petition for Writ of Mandamus and Prohibition.

The United States Supreme Court has indicated that the remedy of mandamus is a "drastic one, to be invoked only in extraordinary situations". Kerr v. United States District Court, 426 U.S. 394, 402 (1976); Will v. United States, 389 U.S. 90, 95 (1967); Bankers Life and Casualty Company v. Holland, 346 U.S. 379, 382-385 (1953); Ex parte Fahey 332 U.S. 258, 259 (1947). The "extraordinary situation" which would justify this remedy is a judical usurpation of power. Will v. United States, supra, at 95.

It is also pointed out in Kerr v. United States District Court, supra at 403, that issuance of the Writ is largely a matter of discretion with the court to which the petition is addressed. Schlagenhauf v. Holder, 379 U.S. 104, 112n. 8 (1964).

Given the circumstances of this case, the Tenth Circuit Court of Appeals apparently decided that the District Court's Action did not constitute a usurpation of power and, therefore, denied the petition. The Respondents respectfully contend that the Court of Appeals acted within its discretion in denying the Writ of Mandamus and that the Petition for Writ of Certiorari should be likewise denied.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit has been mailed this 29th day of November, 1979 to:

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